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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-332

CHARLES LAURENT FIOCCONI and JEAN CLAUDE KELLA,

Petitioners,

—v.—

ATTORNEY GENERAL OF THE UNITED STATES, UNITED STATES ATTORNEY, and UNITED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF NEW YORK, and WARDEN, FEDERAL DETENTION HEADQUARTERS, West Street, N. Y.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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October Term, 1972

No.

CHARLES LAURENT FIOCCONI and JEAN CLAUDE KELLA,

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—v.—

ATTORNEY GENERAL OF THE UNITED STATES, UNITED STATES ATTORNEY, and UNITED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF NEW YORK, and WARDEN, FEDERAL DETENTION HEADQUARTERS, West Street, N. Y.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Comes now Raymond Bernhard Grunewald, attorney for the petitioners, and hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case, entered June 12, 1972.

Opinions Below

The opinions, interim and final, of the United States Court of Appeals for the Second Circuit are at this time unreported. They are set forth in Appendix A and B, pp. 1a *et seq.*

Jurisdiction

The judgment of the panel of the Court of Appeals was entered on June 12, 1972. This petition is filed within ninety (90) days of the date of entry of judgment of the Court of Appeals. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

Questions Presented

1. Whether persons, having been formally extradited from a foreign country at the request of the government of the United States:

> (1) where the extradition was based on a specific single charge indictment and evidence relating only to proof of that single charge, and
>
> (2) where the foreign sending state specifically directed the extradition of the persons concerned to stand trial on the specific charge as stated in the indictment of a specific federal district, the District of Massachusetts,

while awaiting trial on this charge, may lawfully be subsequently subpoenaed to another federal district, arrested there pursuant to another indictment, and be tried and convicted of separate and distinct charges relating to events which occurred prior to their extradition.

2. Whether the opinion and doctrine set forth by this Court in *United States* v. *Rauscher*, 119 U.S. 407 (1886) is still the law of the land.

Statement

On November 20, 1969, petitioners were indicted by the Grand Jury for the District of Massachusetts, at Boston, for allegedly conspiring to unlawfully import heroin into the United States in violation of § 174, Title 21, U.S.C. A warrant was duly issued by the United States District Court for the District of Massachusetts and they were arrested, pursuant to this warrant, in Italy on August 6, 1970.

Based upon the United States District of Massachusetts indictment and arrest warrant, the United States government instituted extradition proceedings with the government of the Republic of Italy for the stated purpose of extraditing petitioners (French nationals) to the United States District of Massachusetts to stand trial under the District of Massachusetts indictment.

As a result of an original informal request, the District of Massachusetts bench warrant, and the subsequent formal extradition request in September 1970 by the United States, petitioners were kept in confinement by Italian authorities. Petitioners resisted extradition to the United States and protracted hearings and other legal proceedings were had before the proper authorities of the Italian Government.

There was no treaty between the United States and Italy governing the extradition of persons accused of violating the narcotic laws of the United States.[1]

The evidence submitted to the Italian Government, and upon which it acted, consisted only of certified copies of the District of Massachusetts indictment, certified copies

[1] As may be gleaned from Note Verbale No. 736(71/12857), (Appendix C), a new treaty had been negotiated but has not yet been ratified.

of the Warrants of Arrest, affidavits describing the petitioners, and the minutes of the evidence which the federal grand jury in Massachusetts acted upon in returning its indictment on November 20, 1969 and which dealt with events occurring from September 15, 1968 up to April 22, 1969.

In its representation to the Italian government, for the extradition of petitioners to stand trial on the District of Massachusetts charge, the United States stated:

> "The United States Government is aware that narcotics offenses are not among those crimes listed in the Extradition Convention of 1868 between the United States and Italy and the supplementary conventions thereto. However, it is understood that the Italian Government can grant extradition, apart from treaty . . .
>
> ". . . it is hoped that the Italian Government will, *as an act of comity*, give favorable consideration to the United States Government's request for the extradition . . ." [Emphasis supplied]

In its decision, the Italian Court of Appeals reviewed the evidence submitted with respect to the District of Massachusetts indictment and, at p. 11 therein (as translated), ruled:

> ". . . in favor of the extradition to the United States of America, *according to the request made for it by that government*, of the French citizens Kella, Jean Claude, and Fiocconi, Laurent, *so that they can be subjected to judgment according to the writ of indictment against them formulated by the grand jury of the District Court of Appeals of Massachusetts* dated the 20th of November, 1969, and according to the consequent order for arrest on the same date;" [Emphasis supplied]

Thus the Italian authorities authorized the extradition of petitioners, to the District of Massachusetts at Boston, Massachusetts, to stand trial there for the specific and sole offense alleged in the District of Massachusetts indictment, in an extradition based on the principle of Comity pursuant to the Law of Nations.

On October 6, 1971, petitioners were duly delivered to American authorities and were flown, the same day, to Boston, Massachusetts. On October 7, 1971, the United States District Court for the District of Massachusetts set bail. On November 6, 1971, petitioners posted the requisite surety bonds.

On or about November 10, 1971, the office of the United States Attorney for the Southern District of New York, served grand jury subpoenaes upon petitioners for the ostensible purpose of having them appear as witnesses before a New York federal grand jury conducting an investigation into violations of the narcotic laws of the United States.

Compelled by legal process, petitioners dutifully appeared in the Southern District of New York on November 11, 1971, after the United States District Court in Boston, Massachusetts, amended its bond order to extend the limits of their travel to the Southern District of New York, conditioned upon their "return" to Massachusetts upon completion of their appearance before the New York federal grand jury.

Petitioners' immediate challenge to the New York federal grand jury subpoenaes was rendered moot by the return, by the very same grand jury, of an indictment, 71 CR 1267, on November 12, 1971, naming them as the *sole* defendants

therein, and by the issuance of an arrest warrant against petitioners based thereon. Petitioners were arrested in Judge Gurfein's ante chambers while waiting for their motion to be signed.

The Southern District of New York indictment, 71 CR 1267, charged petitioners with a single substantive crime of receiving, concealing, selling and facilitating the transportation and sale of a narcotic drug, in violation of § 174, Title 21 U.S.C., on or about May 27, 1970, within the Southern District of New York, a time prior to the extradition of petitioners and subsequent to the time period alleged in the Massachusetts indictment. On failure to post the additional New York bail, petitioners were remanded to custody.

On December 9, 1971 an Order to Show Cause (71 CIV 5350) why a Writ of Habeas Corpus should not issue was signed by the United States District Court, Weinfeld, J., and arguments were heard on December 23, 1971. Pending a determination of the Writ, on January 4, 1972, the grand jury for the Southern District of New York returned a sealed superseding indictment, 72 CR 4, and on January 20, 1972, petitioners entered pleas of not guilty thereto.

Facts attesting to violations of Constitutional and International law, as a result of actions resulting from indictment 71 CR 1267, were fully set forth in a petition for a Writ of Habeas Corpus, 71 CIV 5350, dated December 7, 1971, duly filed with the District Court on December 9, 1971, together with a memoranda of law in support thereof, and in arguments presented by counsel for petitioners before the United States District Court, on December 23, 1971, together with supporting documents, including copies

of the Order of Extradition from the Republic of Italy, under seal, with translation by the United States Consul in Italy.

A virtually identical petition for a Writ of Habeas Corpus, with respect to both 71 CR 1267 (by reference and incorporation) and 72 CR 4, was duly filed before the District Court on February 1, 1972, as 72 CIV 446. All previous supporting documents were again included. Documents were to be supplied by the government with respect to correspondence between the government and the Republic of Italy. Arguments by both sides were made on February 9, 1972. On March 16, 1972 the petition was denied in the District Court.

Indictment 72 CR 4 charged petitioners, together with others, with conspiring, in Count 1 therein, from *January 1, 1970* until approximately January 4, 1972 (the return date of the indictment),[2] to import, sell, transport, etc., heroin into and in the United States, within the Southern District of New York "and elsewhere". The overt acts, one each, referring to petitioners, dealt with events in May 1970. Count II charged petitioners, and others, with importing heroin into the United States, in the Southern District of New York, on May 27, 1970. Count III charged petitioners, and others, with receiving, concealing, selling and facilitating the transportation, etc., of the same heroin referred to in Count II, on May 29, 1970. Thus the charge originally made in indictment 71 CR 1267, (subsequently

[2] At the trial, the evidence presented terminated the conspiracy around May of 1971. Accordingly the indictment's reference to violations of the new narcotics statute, §§ 812, 841(a)(1), 841(b)(1)(A), 951(a)(1) and 952, Title 21, U.S.C., were stricken by the trial Court.

dismissed) the subject of petitioners' original application for a Writ of Habeas Corpus, had been lumped into an overall conspiracy with other persons. Nevertheless the acts charged in the new indictment, 72 CR 4, all occurred subsequent to the acts charged in the Massachusetts' indictment, for which petitioners were originally extradited, and all references therein (and trial proof) with respect to petitioners were to dates prior to their extradition.

Furthermore, 72 CR 4 does not overlap the Boston indictment returned in November 1969 as to a conspiracy that ended, as the Boston Grand Jury noted, on *April 22, 1969*, some seven (7) months earlier, a clear hiatus in time.

Inquiries made by the government of the United States with respect to the Italian government's attitude as to the trial of petitioners on charges for which they were, admittedly, not extradited (Appendix C), has been recently responded to with an expression of surprise that the United States has acted unilaterally. (Appendix D)

Petitioners, convicted after jury trial on May 24, 1972, were sentenced on June 19, 1972. An appeal from the conviction is presently pending before the Second Circuit with argument scheduled for the week of October 30, 1972.

ARGUMENT

I

Where there is a formal extradition proceeding between nations, whether pursuant to treaty or comity, and the evidence presented in support of the extradition enumerates a specific charge in a stated jurisdiction, and the sending state extradites a person to stand trial on the specific charge in the specific jurisdiction, the person so extradited can be tried only for the specific crime for which he was extradited and only in the specific jurisdiction to which he was extradited.

Petitioners were lawfully extradited to this country from the Republic of Italy upon the formal request of the United States of America on the basis of the International Law principle of comity and not pursuant to any treaty.

It is contended that the instant case is governed by *United States* v. *Rauscher*, 119 U.S. 407 (1886) and as emphasized in *Ford* v. *United States*, 273 U.S. 593 (1927).

In *Rauscher*, the defendant was surrendered to the United States upon a charge of murder, pursuant to a treaty ". . . for the giving up of criminals, fugitive from justice, in certain cases." *Id.* at 410. Among the crimes specified was murder. The defendant was tried for a *lesser* offense which encompassed the same act investigated at the proceedings preliminary to the warrant of extradition and the same witnesses. *Id.* at 431. This Court attached no importance to the alleged similarity. *Id.* at 432. It held:

> "(1) that the court for the Southern District of New York did not have jurisdiction to try the defendant upon another indictment even if the acts

proved were identical to those proved in the extradition proceedings;

(2) the defendant, *having been surrendered for a specific charge, was exempt from prosecution upon other charges* and had the right to return to the country from which he was extradited;

(3) the trial court had *no jurisdiction to try the defendant for any other indictment.*" [Emphasis supplied]

Id. at 409, 410, 433.

In so holding, this Court, in *Rauscher*, 119 U.S. at 419, 420, stated:

"We have already seen that according to the doctrine of publicists and writers on international law, *the country receiving the offender* against its laws from another country *had no right to proceed against him for any other offense than that for which he had been delivered up.* This is a principle which commends itself as an appropriate adjunct to the discretionary exercise of the power of rendition, because *it can hardly be supposed that a government which was under no treaty obligation nor any absolute obligation of public duty to seize a person who had found an asylum within its bosom and turn him over to another country for trial, would be willing to do this,* unless a case was made or some specific offense of a character which justified the government in depriving the party of his asylum. *It is unreasonable that the country of the asylum should be expected to deliver up such person to be dealt with by the demanding government without any limitation, implied*

or otherwise, upon its prosecution of the party." (Emphasis supplied)[3]

The only evidence before the Italian authorities on which they determined to grant extradition, was the District of Massachusetts indictment and warrant of arrest, an affidavit identifying the petitioners, and the minutes of the proceedings before the Grand Jury which returned the District of Massachusetts indictment. The Italian Government agreed to give up petitioners to this country for the

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[3] The Second Circuit reviewed an analogous situation in *United States ex rel Donnelly* v. *Mulligan et al*, 74 F.2d 220 (2d Cir. 1934). There the relator was originally extradited from France to be tried in New York. He was not tried on the New York indictment but re-extradition to Canada was applied for by Canada and was granted. He sought a Writ of Habeas Corpus. In upholding the Writ the Circuit stated, in regard to the subject matter of extradition:

> "The more modern writers, however, are united in considering extradition not as a duty, but as a matter of favor or of comity." *Id.* at 221.
>
> * * * * *
>
> "It is this matter of bad faith which would be here involved if extradition of the appellant to Canada be granted. The republic of France gave up the appellant to this country so that this country might try him for this specific crime and no other. The Congress of the United States, by Title 18, U.S.C. . . . has clothed the criminal with protection while he is here so that he may be tried only for the crime for which he has been extradited." *Id.* at 222.
>
> * * * * *
>
> "The appellant had a place of asylum in France and could be deprived of this only by the action of the French government. . . . We do not know that sufficient evidence would be introduced to satisfy France that the appellant is a proper subject for extradition. Evidence which might be sufficient for this country might or might not be sufficient for France. . . . [The] . . . *state of asylum, has a sovereign right to safeguard and protect its sovereignty, even though that may be construed as an injustice to the world; it has a right to decide for itself . . .*" *Id.* at 223. [Emphasis supplied]

specific purpose of standing trial *only* for the single specific offense set forth in the United States District of Massachusetts indictment of November 20, 1969 and no other offense.

In *Rauscher*, *supra*, at 422, this Court, in speaking on this issue of international transfer, said:

> "As this right of transfer, the right to demand it, the obligation to grant it, the proceedings under which it takes place, all show that it is for a limited and defined purpose that transfer is made, it is impossible to conceive of the exercise of jurisdiction in such a case for any purpose than that mentioned in the treaty . . . [here by comity] . . . and ascertained by the proceedings under which the party is extradited, without implication of fraud upon the rights of the party extradited, and of bad faith to the country which permitted his extradition."

See also *United States ex rel. Donnelly* v. *Mulligan*, 74 F.2d 220, 222 (2d Cir. 1934); *In re Baruch*, 41 F. 472, 473 (C.C.S.D.N.Y. 1890). Cf. *Autry* v. *Wiley*, 440 F.2d 799, 801 (1st Cir. 1971).

Thus the petitioners, in the instant case, could not, while within the jurisdiction of the United States, pursuant to the warrant of extradition, be arrested for another crime, though generically similar, allegedly committed by them *prior* to the extradition proceedings.[4]

On this issue *Rauscher*, *supra* at 424, stated that a person extradited from a foreign country had the *right*:

> *"to be tried only for the offense for which he is charged in the extradition proceeding and for which*

[4] Neither the District Court, the Circuit Court, nor the Government contests that the Massachusetts indictment charges a separate and distinct crime from that which is charged in New York.

> *he was delivered up*, and if not tried, or after trial and acquittal, *he shall have a reasonable time to leave the country before he is arrested upon the charge of any other crime committed previous to his extradition.*" (Emphasis supplied)

United States ex rel. Donnelly v. *Mulligan, supra; Cosgrove* v. *Winney*, 174 U.S. 64 (1889); *In re Baruch, supra; In re Fitton*, 95 F. 471, 472 (1891); *In re Reinitz*, 39 F. 204, 206 (S.D.N.Y. 1889).

Again, in *Rauscher, id.* at 430, this Court further emphasized the rights of an extradited person. It stated:

> ". . . the weight of authority and of sound principle are in favor of the proposition that a person who has been brought within the jurisdiction of the court by virtue of proceedings under an extradition treaty can only be tried for . . . the offense with which he is charged in the proceeding of his extradition until a reasonable time and opportunity have been given him after his release or trial upon such charge to return to the country from whose asylum he had been forcibly taken under those proceedings."

In *Ford* v. *United States*, 273 U.S. 593 (1927), this Court reviewed *Rauscher* and noted, at 615:

> "The opinion of the Court was delivered by Mr. Justice Miller, and his conclusions were based, *first, on the ground that*, according to the doctrine of publicists and writers on international law, *the country receiving the offender against its laws from another country in the absence of treaty has no right to proceed against him for any other offense than that for which he had been delivered up;* second, that the enumeration of the offenses in the treaty there involved marked such a clear line in regard

> to the magnitude and importance of those offenses that it was impossible to give any other interpretation to it that the exclusion of the right of extradition in others; third, the provisions of the treaty giving a party an examination before a judicial tribunal in which, before he should be delivered up, the offense for which he was to be extradited must be proved to the satisfaction of the tribunal, left no doubt that the purpose of the treaty was that the person delivered up should be tried for that offense and no other; and fourth, that *the provision of §§ 5272 and 5276 of the Revised Statutes required such course in the trial of extradited persons.*"[5] [Emphasis supplied]. See also, *United States v. Rauscher, id.* at 423-424.

In *Ker* v. *Illinois*, 119 U.S. 436 (1886) (which formed the keystone of the government's position and the District Court's denial of the Writ), decided the same day as *Rauscher*, the factual pattern was markedly different from either *Rauscher* or the instant case. *Ker was not extradicted.* He was forcibly kidnapped, without the knowledge or consent of the government of Peru, by a private citizen, placed on board a private ship and ultimately delivered to state authorities who had issued a warrant for his arrest. He was tried for larceny and convicted of embezzlement by the state issuing the warrant. In discussing the contentions of Ker, this Court noted, at 440-441:

> ". . . for mere irregularities in the manner in which he may be brought into the custody of the law . . . [he can not complain] . . ."
>
> * * * * *

[5] §§ 5273 and 5275, Revised Statutes, were forerunners of the present § 3192, Title 18, U.S.C.

> ". . . The case does not stand, . . . as it would have stood *on a writ of habeas corpus* in . . . [any jurisdiction] . . . through which he was carried in the progress of his extradition, to test the authority by which he was held; . . ."

Thus mere preparation of extradition papers, without use, was not enough. Continuing at 442-443, this Court specifically noted that Ker's removal from Peru was without either government's participation . . . a purely extra-governmental act not binding on either Peru or the United States. Then, the Court compared this with its just rendered opinion in *Rauscher*, which was concerned with an extradition pursuant to the acts of government and by lawful means.

Thus the distinctions between *Rauscher* and *Ker* are clear. They lie in the manifestly moral principle that nations, and their courts, are bound by the means of the extradition. When extradition is pursuant to the official acts of consenting nations then the receiving nation is bound to honor the terms of the extradition as stated to the sending nation and as agreed to by the sending nation. These terms, when arrived at, are unalterable once extradition, its purpose, is accomplished. Extradition, rooted in legal means, attaches jurisdiction which obtains for the sole stated purpose of the extradition. When the extradition purpose is deviated from, jurisdiction is lost. When there is no extradition, when the person is delivered by illegal means, jurisdiction, not being conditioned upon legal extradition, is unencumbered by the illicit means employed to get it. Such a removal is ". . . clothed with no rights

which a proceeding under . . . [law] . . . could have given him." *Ker* v. *Illinois* at 443.[6]

II

The charge for which petitioners were indicted in the district of Massachusetts is a separate offense from that which is charged in the Southern District of New York. Accordingly, they can not be lawfully tried for a specific crime for which they were not extradited. To do so violates their rights and guarantees under §3192, Title 18, U.S.C.

§ 3192, Title 18, U.S.C. provides:

> "*Whenever any person is delivered by any foreign government* to an agent of the United States, *for the purpose of being* brought within the United States and *tried for any offense of which he is duly accused,* the President shall have power to take all necessary measures for the transportation and safekeeping of such accused person, and for his security against lawless violence, *until his final discharge from custody* or imprisonment *for or on account of such offenses,* and for a reasonable time thereafter, . . ." (Emphasis supplied)

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[6] In *Johnson* v. *Browne,* 205 U.S. 309 (1907), the defendant, after conviction and pending the determination of his appeal, fled and took refuge in Canada. Attempts to extradite him, pursuant to treaty, failed, since the crime for which he had been convicted was not within the purview of the treaty. He was then extradited on a charge within the treaty provisions. Upon the government's securing of his person he was promptly incarcerated pursuant to his conviction sentence and was never tried on the charge which permitted his extradition! In upholding the Writ this Court found the rationale of *Rauscher* to be applicable since jurisdiction over the person attached only for the stated purpose of the extradition. The fact that the extradition was a deceitful ruse did not change its obligation or make it an unlawful seizure that took it within the purview of *Ker.*

See, *United States* v. *Rauscher*, 119 U.S. 407, 423-424; *Cosgrove* v. *Winney*, 174 U.S. 64 (1899); *Johnson* v. *Browne*, 205 U.S. 309 (1907); *Ford* v. *United States*, 273 U.S. 593, 615 (1927); *United States ex rel. Donnelly* v. *Mulligan et al.*, 74 F.2d 220, 222 (2d Cir. 1934); *In re Reinitz*, 39 F. 204 (S.D.N.Y. 1889).[7]

As noted previously, in spite of the clear injuncture of law, federal authority, on November 12, 1971, had petitioners arrested upon bench warrants stemming from a New York Grand Jury indictment, 71 CR 1267, charging a generically similar but totally separate offense allegedly committed by petitioners prior to their extradition proceedings in Italy. When application for a Writ of Habeas Corpus was promptly made, still another indictment 72 CR 4, was returned, which merely fragmentized the charges made in 71 CR 1267 (subsequently dismissed). Another appliction for, essentially, the same relief, was promptly made. The "new" indictment charged separate and distinct crimes, albeit generically similar, with respect to the crime charged in the Boston indictment for which the petitioners were specifically extradited. It is respectfully contended that such action is an act of bad faith against the Republic of Italy, and a fraud upon the rights of petitioners in clear violation of § 3192, Title 18, U.S.C., which guarantees the protection of extradited accused.

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[7] While these are "treaty" cases, the protection afforded by the statutes is always presented as a separate basis for not permitting the trial of an extradited person except for the specific charge for which he was extradited. See *Cosgrove* v. *Winney*, *id.* at 68:

> ". . . The treaty *and statute* secured to Cosgrove a reasonable time to return to the country from which he was surrendered . . ." (Emphasis supplied)

As noted previously, the acts and transactions upon which the District of Massachusetts indictment is based, which appeared in evidence before the Italian authorities and which formed the basis of the warrant of extradition, are not the very same, identical acts and transactions upon which the New York Federal Grand Jury founded either indictment 71 CR 1267 or 72 CR 4 against petitioners.* In fact, the petitioners are presently awaiting trial in Massachusetts on the extradition charge! Thus the offenses set forth in the Southern District of New York indictment, 72 CR 4, are "a separate offense" from that charged in the District of Massachusetts indictment and would be so considered by the Italian authorities in their discretionary act of extradition of petitioners. See, *United States* v. *Paroutian*, 299 F.2d 486, 490-491 (2d Cir. 1962); *Greene* v. *United States*, 154 F. 401, 405-406 (5th Cir.), *cert. denied*, 207 U.S. 596 (1907).

In *Paroutian, supra*, the extradition of an accused from Lebanon was based on the principle of comity. Paroutian was first indicted in the Southern District of New York for conspiracy to violate §§ 173, 174, Title 21, U.S.C. At the extradition proceedings before the Lebanese authorities, there was in evidence, not only the formal papers, including the Southern District indictment, but an affidavit of a federal agent which fully apprised the Lebanese authorities of the facts and evidence of Paroutian's involvment in "trafficking" in narcotics in the United States. Furthermore,

> ". . . The Lebanese Warrant of Extradition state[d] that Paroutian was being returned to the United States because he was accused of narcotics trafficking." *United States* v. *Paroutian*, at 490.

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* This has never been contested by either the government or the District Court and was confirmed by the trial evidence.

Upon his return to the United States, Paroutian was *not* tried on the Southern District indictment but on a subsequent indictment from the Eastern District of New York which encompassed the conspiracy count of the Southern District indictment and two substantive counts—receipt and concealment of heroin—not covered by the Southern District indictment, but arising out of the same acts and transactions set forth in the Southern District conspiracy charge. Paroutian claimed this violated his rights and the international law principles laid down in *United States* v. *Rauscher*, 119 U.S. 407, in that he was tried for a crime for which he was not extradited.

The Second Circuit, in *Paroutian*, acknowledged the international law principle of comity discussed in *Rauscher*, *supra*, but drew a distinction and held that Paroutian's rights under those principles were not violated. It held that the "test whether trial is for a 'separate offense' . . . (is) whether the extraditing country would consider the offense actually tried 'separate' ". Thus, in essence, the Second Circuit held that the two indictments against Paroutian were really the same, were based on the same facts and evidence, and for the same offense that was before the Lebanese authorities, upon which they extradited Paroutian for the "general" crime of narcotic trafficking in the United States.

In the instant case petitioners had been arrested, tried and in custody under an indictment that is *not* essentially the same, is totally unrelated to the facts and evidence presented to the Italian authorities and, even under the test laid down by *Paroutian*, is very much a "separate offense". Nor do we have here the sending State's warrant of extradition for the general crime of "narcotic trafficking". Instead

there is a warrant of extradition for a specific offense, in the specific time frame of September 15, 1968 to April 22, 1969, as alleged in the United States District of Massachusetts indictment, and provision is for the return of petitioners, not to the United States in general, but to the court in Boston, Massachusetts, where the trial for the extradited offense is ultimately to be held. Even more compelling, is the fact that the petitioners are awaiting trial on the Massachusetts indictment as well!

Paroutian is not in conflict with petitioners' rights under the principles enunciated in *United States* v. *Rauscher supra.* To sustain a holding that the petitioners can be lawfully tried in New York merely because it was for generically similar offenses to that charged in the Italian Warrant of Extradition, even though committed prior to the extradition proceeding but unconnected with these proceedings by any identity of evidence or fact, would make a mockery of the principle of comity and the rights of persons extradited pursuant to those principles. It is a distinction without a difference and nullifies *United States* v. *Rauscher.* Even Paroutian was tried only once. Petitioners, extradited for trial on one charge are now threatened with two separate convictions.

In its consideration of petitioners' application the Second Circuit's position was:

> ". . . fortified by Art. III of the Extradition Convention between the United States and Italy, 15 Stat. 631 (1868) . . . [since] If the countries had intended that the requesting government could not try the accused for any crime committed before the time of his surrender, they could have accomplished this by adopting one of the standard clauses to that

> end . . . Although we are here concerned with a crime not within the Extradition Convention, Article III provides some indication of the limits of Italy's concern with the prosecution of persons whom it surrenders to the United States and of the conditions upon which extradition between the two countries normally occurs. Thus, we think the article bolsters our conclusion that Italy would not consider the actions of the United States to be a breach of faith with its acts of comity." *Id.* at pp. 3451-3452, slip opinion.

It is respectfully answered that the Second Circuit's reliance on the Convention of 1868, with respect to indicia of the intention of the extraditing nations *at the time of extradition*, was misplaced. As may be gleaned from Note Verbale No. 736, dated Rome, December 2, 1971, from the government of the United States of America to the government of the Republic of Italy, there was then in effect a recently negotiated Treaty of Extradition which is to be signed in the near future. *This treaty specifically prohibits*, in Article XV, *the trial or punishment of persons extradited for other than those crimes for which extradition was granted.* (Appendix C)[9]. Because of this obvious mutual commitment to a course of conduct contrary to that which the receiving nation had unilaterally engaged in, the United States Department of State has undertaken to attempt to obtain ex post facto authority:

> "In view of the language of the new treaty, the Embassy has been instructed formally to ascertain

[9] A photocopy of this document was furnished to petitioners by the government incident to discovery procedures relating to the trial of 72 CR 4. It was marked defense Exhibit "A", in evidence, at some time subsequent to the oral arguments presented before the Circuit Court on May 12, 1972, and was not a document on file at the time of the preparation of the brief or appendix.

> whether the government of Italy has any legal objection to the trial . . . on the further charges . . ." (Appendix C)

Thus, from this alone, it must be clear that Italy and the United States of America were in mutual accord on the very principle enunciated in *United States* v. *Rauscher*, 119 U.S. 407 (1886), and that it was the intention of both the sending and receiving state to abide by the forthright principle of trying extradited persons only for and on that indictment for which they were specifically extradited.

It is respectfully contended that the burden of showing that a foreign nation would not affirmatively protest a patent breach of understanding as to extradition is upon the government of the United States and not upon the individual whose right to protest has been acknowledged in both domestic and international law. This is inherent in *Rauscher*. Nevertheless, this burden has been met in the sense that there is the acknowledgment, made by the government of the United States of America, inherent in the newly negotiated treaty and, secondly, in the very recent receipt of what is an obvious expression of surprise from the government of Italy as to the United States of America's unilateral action in the instant case. (Appendix D)

At stake is not only the rights of these petitioners but the good faith of the United States in the eyes of the international law community.

For the above reasons the continuing detention and deprivation of liberty of the petitioners under their arrest and conviction under 72 CR 4, S.D.N.Y., is illegal and void.

APPENDIX A

Interim opinion of The Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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CHARLES L. FIOCCONI and
JEAN C. KELLA,
Appellants,

V. 72-1425

ATTORNEY GENERAL of the UNITED STATES OF AMERICA, and UNITED STATES MARSHAL for the SOUTHERN DISTRICT OF NEW YORK, and WARDEN, FEDERAL DETENTION HEADQUARTERS, WEST STREET, NEW YORK,
Respondents.

- x

Before:

HON. HENRY J. FRIENDLY, Chief Judge,
Presiding.
HON. CARL McGOWAN, Circuit Judge,
Washington, D.C.
HON. WILLIAM H. TIMBERS, Circuit Judge,
Second Circuit.

New York, New York
May 12, 1972 - 10:30 a.m.

APPEARANCES

GRUNEWALD, TURK & GILLEN, Esqs.,
Attorneys for Appellants
16 Court Street,
Brooklyn, New York 858-6464
By: RAYMOND BERNHARD GRUNEWALD, Esq.,
Of Counsel.

WHITNEY NORTH SEYMOUR, JR.,
United States Attorney for the Southern District
By: ARTHUR J. VIVIANI, Esq.,

JUDGE FRIENDLY: I have had a reporter present because I thought my ruling had better be taken down.

This appeal does present a question of difficulty. We are not inclined to agree with the portion of the opinion of a greatly respected District Judge which puts extradition obtained under the principle of comity in the same category as obtaining the person of the accused by unlawful means and involving no governmental action.

We agree with Mr. Grunewald that extradition through comity falls under the principle of Rauscher, in the first place because that is what Rauscher says.

Second, because we think this Court recognized that principle in Paroutian, and,

Third, because it seems to follow as a matter of common sense.

On the other hand, we are not convinced that Italy would regard the trial of these men on a charge that is so closely related, perhaps, so much the same nature as that for which they were extradited, and which is not forbidden by the clause in the treaty to which Judge Weinfeld referred, quoted at page 53A of the appendix, as a breach of the United States "international obligations."

The matter is now before us only in a preliminary way and, actually, the only issue is whether the writ shall issue, not what the rights of these defendants may be in the event that they are convicted after trial.

We, therefore, are going to deny the stay.

We will in due course issue an opinion affirming the denial of the writ on grounds different from those which the District Court enunciated.

It may be that before such an opinion is written we will have word one way or the other from Italy.

I would have to revise my previous remark and say that if in that interval it became apparent that the Italian Government did object, I think our ruling would be different.

We, therefore, deny the stay at this time. We will issue an opinion in due course.

We will expect the parties to keep us advised of all developments between the United States and Italy and I think that is it.

One reason I wanted to have a reporter here was that it occurred to me that Mr. Grunewald might wish to go elsewhere and now you have the material with which to go.

I do want to make clear that we do not intend to preclude you from raising the point again in the event of a conviction or in light of the developments that may occur.

* * *

I (We) hereby certify that the foregoing is a true and accurate transcript, to the best of my (our) skill and ability, from my (our) stenographic notes of this proceeding.

s/ Edward E. Odette (illegible)
Official Court Reporter
U.S. District Court

APPENDIX B

Opinion of The Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 833—September Term, 1971.

(Argued May 12, 1972 Decided June 12, 1972.)

Docket No. 72-1425

CHARLES LAURENT FIOCCONI and JEAN CLAUDE KELLA,

Petitioners-Appellants,

v.

ATTORNEY GENERAL OF THE UNITED STATES, UNITED STATES ATTORNEY, and UNITED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF NEW YORK, and WARDEN, FEDERAL DETENTION HEADQUARTERS, West Street, N. Y.,

Respondents-Appellees.

Before:

FRIENDLY, *Chief Judge,*
McGOWAN* and TIMBERS, *Circuit Judges.*

Appeal from an order of the District Court for the Southern District of New York, Edward Weinfeld, *Judge,* denying petition of appellants, who had been extradited from Italy for trial in the District of Massachusetts, for release from custody in the Southern District of New York.

Affirmed.

* Of the United States Court of Appeals for the District of Columbia Circuit, sitting by designation.

RAYMOND B. GRUNEWALD, Esq. (Grunewald, Turk & Gillen, Brooklyn, N. Y., of Counsel), *for Appellants.*

ARTHUR J. VIVIANI, Esq., Assistant United States Attorney (Whitney North Seymour, Jr., Esq., United States Attorney for the Southern District of New York, Dean C. Rohrer, Esq., and Peter F. Rient, Esq., Assistant United States Attorneys, of Counsel), *for Appellees.*

FRIENDLY, *Chief Judge:*

Appellants Fiocconi and Kella, citizens of France, were indicted in the District of Massachusetts on November 20, 1969, for conspiring from September 15, 1968, through April 22, 1969, to import heroin into the United States in violation of 21 U.S.C. § 174.[1] Bench warrants were issued but could not be executed. Interpol traced appellants to a town in Italy, where in August 1970 they were arrested by the Italian authorities. A month later the United States Embassy in Rome requested extradition. It acknowledged that narcotics crimes were not among those listed in the Extradition Convention between the two governments, 15 Stat. 629 (1868), and subsequent amendments. However, the Embassy expressed its understanding that, independent of the Convention, the Italian Government could grant extradition as an act of comity when the offenses for which this was requested were also crimes under the law of Italy, provided that the relevant treaty did not prohibit extradi-

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1 Section 174 was repealed by Pub. L. No. 91-513, tit. III, § 1101(a)(2), 84 Stat. 1291 (1970). By the terms of § 1105(a), the repealer became effective on May 1, 1971. However, the repealer contained a saving provision, § 1103(a), as to prosecutions under § 174 for violations committed prior to May 1, 1971.

tion for the offenses in question (which the American-Italian Convention did not), and that the offenses with which Fiocconi and Kella had been charged in the United States were in fact crimes under Italian law. Among the papers submitted to the Italian Government were the indictment in and the arrest warrants issued by the District Court for Massachusetts.

After a hearing, a court in Florence directed appellants' extradition "so that they can be subjected to judgment according to the writ of indictment against them formulated by the Grand Jury of the District Court of Appeals of Massachusetts [*sic*] dated the 20th of November, 1969, and according to the consequent order for arrest on the same date." After unsuccessful appellate proceedings, Fiocconi and Kella were delivered in Italy to United States authorities and were removed to Boston on October 6, 1971. They pleaded not guilty. Bail was fixed in the amount of $250,000 each, which was met by surety bond secured by a $500,000 certified check drawn on a Swiss bank.

Soon after their release on bail, Fiocconi and Kella were subpoenaed to appear before a grand jury in the Southern District of New York. When they appeared, they were arrested on warrants issued under an indictment, returned that day, which charged them with the substantive crime of receiving, concealing, selling and facilitating the transportation, concealment and sale of 37 kilograms of heroin in the Southern District of New York on or about May 27, 1970. Bail was fixed at $100,000 for each defendant, a sum which they were unable to post. While a habeas corpus petition was pending, the grand jury returned a superseding indictment charging appellants and 21 other defendants with conspiring to violate the narcotics laws from January 1, 1970 through January 4, 1972[2] and with two substantive

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2 The overt acts extended from May 1970 through October 1971.

offenses in May 1970.[3] Bail was again set at $100,000 each, which Fiocconi and Kella were unable to post. We are advised that the United States has requested Italy to broaden the extradition order to include the New York charges; that Fiocconi and Kella have retained counsel in Italy to resist this; and that no response from the Italian Government has yet been received.

Appellants again petitioned the District Court for the Southern District of New York for release on the ground that their detention there on a charge other than that presented to the Italian Government was an act of bad faith toward the Government of Italy. When the district court denied the petition on March 16, 1972, Fiocconi and Kella appealed and later moved for a stay of their trial, which was to commence on May 16. The appeal and motion were heard on May 12; we announced from the bench that, while our reasons differed from those of the district judge, we had concluded to affirm on the basis of our study of the case and the oral argument, with an opinion to be prepared as soon as practicable, and consequently denied the motion for a stay. On May 24 appellants were found guilty.

If the matter were *res nova,* something could be said for the proposition that appellants' claim is not a matter proper for judicial cognizance. The argument would be that since appellants were lawfully arrested in the Southern District of New York for an offense allegedly committed there, that should end the matter so far as the courts are concerned; consideration of the effect on this country's international relations of holding appellants for trial on a charge differing from the one presented to the Italian Government should be a matter solely for the executive departments, which can better weigh the relative impor-

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3 These were substantially the same crimes charged in the first New York indictment, as to which the Government filed a *nolle prosequi.*

tance of the conviction of two alleged large scale narcotics violators against possible difficulties in securing future extradition from Italy and other foreign affairs considerations. The position would be that extradition is a matter of treaty or of comity between governments; that a breach of faith by the receiving government entails international consequences; but that the treaty or practice confers no rights on persons who have been so extradited unless this has been spelled out.[4]

However, the Supreme Court's decision in *United States* v. *Rauscher*, 119 U.S. 407 (1886), of which more hereafter, where Chief Justice Waite made substantially this argument in dissent, 119 U.S. at 434-36,[5] forecloses any such facile escape from appellants' claim. The district judge in this case concluded the normative principle to be that courts would limit United States criminal proceedings to those specially brought to the attention of the foreign government when extradition had been achieved pursuant to a treaty, but that extradition obtained as a result of the exercise of comity was to be treated like a case where the defendant had been brought to this country without aid from the foreign government. *Ker* v. *Illinois*, 119 U.S. 436 (1886), decided on the same day as *Rauscher* and written by the same Justice, held that where the defendant's removal from the foreign country had been effected extralegally—in that instance through kidnapping by a federal

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4 As, for example, in the treaty with France quoted in *United States ex rel. Donnelly* v. *Mulligan*, 74 F.2d 220, 221 (2 Cir. 1934). See also *United States ex rel. Donnelly* v. *Mulligan*, 76 F.2d 511 (2 Cir. 1935).

5 It seems almost certain that Mr. Justice Gray would have joined Chief Justice Waite in this view if the treaty had stood alone; he concurred since he considered that Rev. Stat. § 5275, *now* 18 U.S.C. § 3192, see footnote 11, *infra*, providing for the protection of persons delivered by any foreign government, indicated the intention of Congress to vest extradited persons with a judicial remedy for breach of an extradition treaty by the United States. See 119 U.S. at 433-34.

officer—the defendant could not raise an issue of illegality in his removal unless the language of a treaty with the foreign country whence he had been removed went so far as to support a construction that each country had recognized a right of asylum in the other, including the right of a fugitive to be free from acts of force that would bring him back to the place of his crime.

We think the district court read *Rauscher* too narrowly. Although the case indeed concerned extradition under a treaty, Mr. Justice Miller began his discussion by considering what the situation would have been without one. He thought it could "hardly be supposed that a government which was under no treaty obligation nor any absolute obligation of public duty to seize a person who had found an asylum within its bosom and turn him over to another country for trial, would be willing to do this, unless a case was made of some specific offense of a character which justified the government in depriving the party of his asylum. It is unreasonable that the country of the asylum should be expected to deliver up such person to be dealt with by the demanding government without any limitation, implied or otherwise, upon its prosecution of the party." 199 U.S. at 419. He went on to observe that the country of asylum "might be very willing to deliver up offenders against such laws as were essential to the protection of life, liberty, and person, while it would not be willing to do this on account of minor misdemeanors or of a certain class of political offenses in which it would have no interest or sympathy." *Id.* at 420. The enumeration of extraditable offenses in treaties was for the very purpose of carrying out "the recognized public law which had prevailed in the absence of treaties." *Id.* Under the Anglo-American Treaty, Rauscher, the second mate of an American vessel, who had been extradited from Great Britain on a charge

of murder of a crewman, could not have been so extradited for unlawfully inflicting cruel and unusual punishment on the same man, "an offense for which the treaty made no provision, and which was of a very unimportant character when compared with that of murder." *Id.* at 432. For the United States to try him for the unextraditable offense was thus a breach of the treaty. Further, and this was the step on which the Justices disagreed, the Court developed a rule of law providing Rauscher with a judicial remedy for this violation of international law. See ALI, Restatement (Second) of the Foreign Relations Law of the United States § 3(h) (1965).

In light of the analysis leading to Mr. Justice Miller's conclusion, we cannot agree that the basic principle of *Rauscher* is inapplicable where extradition has been obtained as an exercise of comity by the surrendering government.[6] In his view a rule of international law required that the receiving country should not try an extradited person for an offense for which the surrendering country would not have granted extradition; the treaty was important only as clarifying what offenses were or were not extraditable.[7] Rauscher's conviction of an offense for which

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6 Appellants argue that we have already crossed this bridge in *United States* v. *Paroutian*, 299 F.2d 486, 490-91 (2 Cir. 1962), since the extradition treaty between the United States and France, which had been extended to Lebanon in 1924 when that country was under French mandate, no longer applied after Lebanon had become independent. However, the United States' request for extradition was made under the treaty, and it is not clear whether the Lebanese Government considered that the treaty was still in effect. In any event, this court's opinion does not focus on the question.

7 It is true that Mr. Justice Miller also discussed the significance of the treaty as a part of the "supreme law of the land, which courts are bound to take judicial notice of, and to enforce in any appropriate proceeding the rights of persons growing out of that treaty . . . ." 119 U.S. at 417-19. The absence of a treaty is not dispositive, however, of a court's obligation to enforce principles of international law which are recognized in our jurisprudence. "International law is part of our law, and must

he was not and could not have been extradited did not violate the treaty, which was silent as to the rights of a person extradited thereunder; it violated a rule of what we would now call United States foreign relations law devised by the courts to implement the treaty. Cf. *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 421-22 (1964), and cases there cited.[8] We likewise can see no reason in principle why the judicial remedy fashioned in *Rauscher* should not also apply when extradition has been obtained as an act of comity by the surrendering nation; the need for preserving the United States from a breach of faith is equally strong.[9]

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be ascertained and administered by courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination." *The Paquete Habana*, 175 U.S. 677, 700 (1900). See also, e.g., *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 423 (1964). Of course, there is the additional question whether an issue such as here presented which involves the foreign relations of the United States is judicially cognizable, see note 9 *infra*.

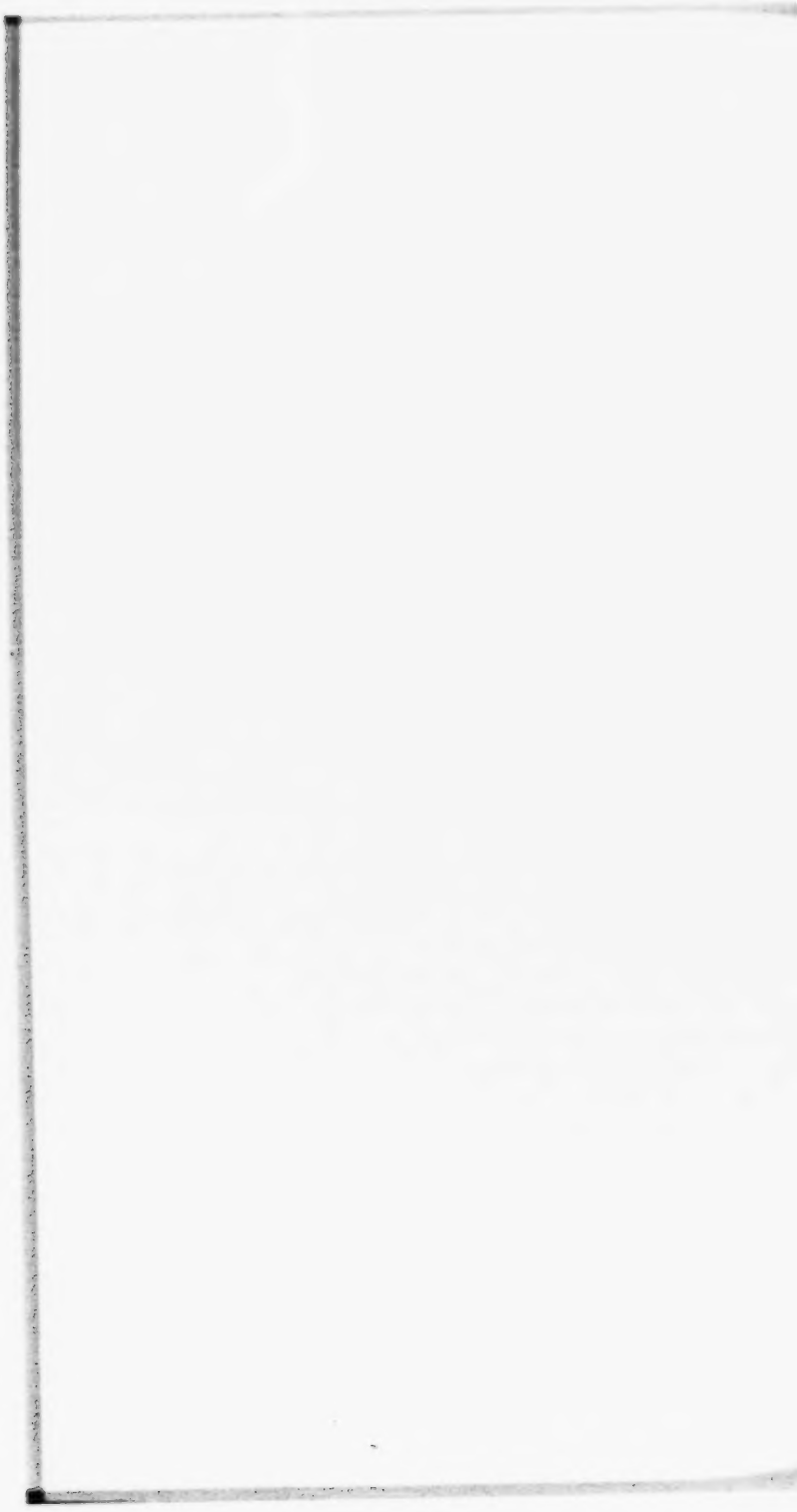
8 It is suggested in 2 O'Connell, International Law 805-06 (1965), that if "the rule of specialty" is one of domestic rather than of international law, subsequent consent by the surrendering government should be of no avail. We do not follow this. The rule, as applied in *Rauscher*, partakes of both natures. But the rule of domestic law conferring a judicial remedy on the extraditee can be a rule according him the remedy only if the surrendering government would object, since the underlying substantive wrong, which grows out of international law, is only to the latter, see *United States ex rel. Donnelly* v. *Mulligan*, *supra*, 76 F.2d at 812-13.

9 In *Baker* v. *Carr*, 369 U.S. 186, 211 (1962), the Court made clear that not "every case of controversy which touches foreign relations lies beyond judicial cognizance." See also *Banco Nacional de Cuba* v. *Sabbatino*, *supra*, 376 U.S. at 423. There exists, to be sure, a body of case law indicating that the infringement of a foreign nation's sovereignty which results from unlawful seizure and abduction of persons or property from the foreign nation's territory by American agents, is not cognizable in a federal court and does not affect its jurisdiction over the person or property. See, e.g., *The Richmond*, 13 U.S. (9 Cranch) 102 (1815) (property); *The Merino*, 22 U.S. (9 Wheat.) 391, 402-03 (1824) (property); *United States* v. *Unversagt*, 299 F. 1015, 1016-17 (W.D. Wash. 1924), *aff'd sub nom. Unversagt* v. *Bess*, 5 F.2d 492 (9

However, the *Rauscher* remedy must be applied in light of the considerations that gave it birth. Since the object of the rule was to prevent the United States from violating international obligations, it becomes essential to determine, as best one can, whether the surrendering state would regard the prosecution at issue as a breach. In *Rauscher* this was altogether clear, in view of the history of negotiations between the two governments in a prior case where Her Majesty's Secretary of State for Foreign Affairs had expressed extreme displeasure over an instance where one Lawrence had been tried for an offense different from that named in the demand made under the treaty and had refused to honor a subsequent demand for one Winslow unless the United States specifically agreed not to do this, see 119 U.S. at 415-16, and the fact that the offense of which Rauscher was convicted was not in the list of extraditable crimes.[10] The latter was also the case in *Cosgrove* v. *Winney*, 174 U.S. 64 (1899), and *Johnson* v. *Browne*, 205 U.S. 309 (1907). The *Johnson* opinion, 205 U.S. at 316-17, laid particular emphasis on the Court's doubt whether Canada would have granted extradition if it had been informed what the United States prosecutors evidently intended to do.

Cir.), *cert. denied*, 269 U.S. 566 (1925) (person); *United States* v. *Sobell*, 142 F. Supp. 515, 523 (S.D.N.Y. 1956), *aff'd*, 244 F.2d 520 (2 Cir.), *cert. denied*, 355 U.S. 873 (1957) (person); *cf. Ker* v. *Illinois*, *supra*, 119 U.S. at 444. However, we deal here not with a violation of territorial sovereignty, but with a possible affront to Italy's sovereignty as a result of an alleged breach of faith with its act of comity. To the extent that there is any question of judicial cognizance of the conduct of our executive branch in the latter situation, this case is controlled by the Court's action in *Rauscher*.

10 As Chief Justice Taft said in *Ford* v. *United States*, 273 U.S. 593, 615 (1927), "the enumeration of the offenses in the treaty . . . involved [in *Rauscher*] marked such a clear line in regard to the magnitude and importance of those offenses that it was impossible to give any other interpretation to it than the exclusion of the right of extradition in others . . . ."



In *United States* v. *Paroutian, supra*, 299 F.2d at 490-91, this court, speaking through Judge Clark, held that "the test whether trial is for a 'separate offense' should be not some technical refinement of local law, but whether the extraditing country would consider the offense actually tried 'separate,'" and went on to express disbelief "that the Lebanese, fully apprised of the facts as they were, would consider that Paroutian was tried for anything else but the offense for which he was extradited, namely, trafficking in narcotics." The letter requesting Paroutian's extradition had attached an indictment dated February 25, 1959, in the Southern District of New York, accusing Paroutian of a conspiracy to violate 21 U.S.C. § 174. He was tried and convicted on an indictment in the Eastern District of New York, filed after the warrant of extradition issued, which included in addition counts for receipt and concealment of heroin not covered by the indictment sent to Lebanon. Admittedly, the instant case requires us to go a step further in that the superseding indictment in New York charged narcotics offenses subsequent to those in the Massachusetts indictment. Still, in the absence of any affirmative protest from Italy, we do not believe that Government would regard the prosecution of Fiocconi and Kella for subsequent offenses of the same character as the crime for which they were extradited as a breach of faith by the United States.

The "principle of specialty" reflects a fundamental concern of governments that persons who are surrendered should not be subject to indiscriminate prosecution by the receiving government, especially for political crimes. Cf. *United States* v. *Rauscher, supra*, 119 U.S. at 419-20; 1 Oppenheim, International Law 702 (Lauterpacht 8th ed. 1955); Bishop, International Law 573-74 (3d ed. 1971). It is hard to believe that Italy would have objected if a superseding indictment including later narcotics offenses had

been filed in Massachusetts. We assume that course would have been followed except for problems of venue, a "technical refinement of local law," with which Italy is scarcely concerned. To be sure, the United States has not made a preliminary showing in Italy with respect to the New York indictment as it did concerning the Massachusetts one, cf. *United States* v. *Rauscher, supra*, 119 U.S. at 422-23. However, we presume the United States is willing to submit such proof if Italy desires it and, with appellants now having been found guilty, there can scarcely be doubt that sufficient proof to warrant extradition exists.

Our conclusion is somewhat fortified by Art. III of the Extradition Convention between the United States and Italy, 15 Stat. 631 (1868), which provides that "the person . . . delivered up for the crimes enumerated . . . shall in no case be tried for any . . . crime, committed previously to that for which his . . . surrender is asked." If the countries had intended that the requesting government could not try the accused for any crime committed before the time of his surrender other than the crime for which he was extradited, they could have accomplished this by adopting one of the standard clauses to that end. See 1 J. Moore, Extradition §§ 148-49, at 194-96 (1891). Compare *Collins* v. *O'Neil*, 214 U.S. 113, 122-23 (1909). The special provision in this treaty could well be read as an acquiescence in trial for crimes before surrender, at least if of the same general nature, provided only that they were not antecedent to that for which the surrender was asked. If narcotics offenses had been included in the Convention, it would thus be fairly arguable that, by virtue of the quoted provision, appellant could be prosecuted under the New York indictment, quite apart from the analysis made above. Although we are here concerned with a crime not within the Extradition Convention, Article III provides some indication of the limits of Italy's concern with the prosecution

of persons whom it surrenders to the United States and of the conditions upon which extradition between the two countries normally occurs. Thus, we think the article bolsters our conclusion that Italy would not consider the actions of the United States to be a breach of faith with its acts of comity.

No different conclusion is called for by 18 U.S.C. § 3192.[11] Despite the narrower phrase used in the statute, we read the references to a predecessor act in *Rauscher*, 119 U.S. at 423, and also in *Cosgrove* v. *Winney, supra*, 174 U.S. at 67, and *Johnson* v. *Browne, supra*, 205 U.S. at 317-18, as considering the statute to be merely congressional recognition of the principle that a person who has been extradited should not be tried for an offense which the foreign country would consider to be outside the limits of its act of extradition. As shown, so broad a principle does not aid these appellants.

We therefore affirm the district court's denial of the writ.[12] While such affirmance will not preclude Fiocconi and Kella from again raising the point on an appeal from their convictions, this opinion will constitute the law of the case as far as this court is concerned, see *Zdanok* v. *Glidden Co.*, 327 F.2d 944, 949-53 (2 Cir.), *cert. denied*, 377 U.S. 934 (1964), in the absence of any new developments, of fact or of law, that would call for a different conclusion.

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11 Whenever any person is delivered by any foreign government to an agent of the United States, for the purpose of being brought within the United States and tried for any offense of which he is duly accused, the President shall have power to take all necessary measures for the transportation and safekeeping of such accused person, and for his security against lawless violence, *until the final conclusion of his trial for the offenses specified in the warrant of extradition*, and until his final discharge from custody or imprisonment for or on account of such offenses, and for a reasonable time thereafter, and may employ such portion of the land or naval forces of the United States, or of the militia thereof, as may be necessary for the safe-keeping and protection of the accused. (Emphasis supplied)

12 In order to remove any doubt as to the running of periods for review, we vacate our oral order and direct that this opinion constitute the judgment of the court.

APPENDIX C

Note Verbale No. 736, dated Rome, December 2, 1971 (71/12857)

No. 71/12857

UNITED STATES OF AMERICA

DEPARTMENT OF STATE

TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETING:

I CERTIFY THAT Phillip V. Battaglia [illegible] name is subscribed to the paper hereto annexed, was at the time of subscribing the same, [illegible] Vice Consul of the United States [illegible] Rome, Italy duly commissioned; and that [illegible] and confidence are due to his acts as such.

IN TESTIMONY WHEREOF, I, U. Alexis Johnson, Acting Secretary of State, have hereunto caused the seal of the Department of State to be affixed and my name subscribed by the Authentication Officer of the said Department, at the city of Washington, in the District of Columbia, this twenty-seventh day of December, 1971.

U. Alexis Johnson
Acting Secretary of State

[SEAL]

BY Barbara Hartman
Authentication Officer,
Department of State.

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Republic of Italy)
Province of Rome) ss:
City of Rome)
Embassy of the United States of America)

I, Phillip V. Battaglia, Vice Consul of the United States of America at Rome, Italy, duly commissioned and qualified, do hereby certify that the annexed copy of Note Verbale No. 736 dated December 22, 1971 and enclosures thereto, transmitted by the Embassy of the United States of America to the Italian Ministry of Foreign Affairs, Rome, is a true and faithful copy of the original this day exhibited to me, the same having been carefully examined [illegible] me and compared with the said original and found to agree [illegible] word for word and figure for figure.

IN WITNESS WHEREOF I have hereunto set my hand and affixed [illegible] seal of the Consular Service of the United States of America [illegible] Rome, Italy, this 22nd day of December, 1971.

Phillip V. Battaglia
Vice Consul of the United States
of America

[SEAL]

The Embassy of the United States of America refers to the extradition from Italy on or about October 6 of Jean Claude Kella and Charles Laurent, both French nationals, on the basis of the narcotics charges pending against them in the United States District Court for the District of Massachusetts. Messrs. Kella and Laurent were extradited by Italy pursuant to the request of the United States Government despite the fact that the 1868 Treaty, as supplemented, does not explicitly make narcotics offenses extraditable.

Information has become available since the extradition of Messrs. Kella and Laurent to the United States as the result of which the United States Attorney for the Southern District of New York has sought and obtained an indictment against Messrs. Kella and Laurent for the sale of heroin (37 kilograms) in the United States in violation of title 21 U.S.C. 173 and 174. Copies of this indictment, filed November 11, 1971, and of the applicable provisions of United States law are attached for information purposes.

Embassy of the United States of America,
Rome, December 22, 1971

Pursuant to the arrest warrant issued as the result of this indictment, Messrs. Kella and Laurent were arrested shortly after their release on $250,000 bail each by the United States District Court, District of Massachusetts on the charges for which they were extradited from Italy. The United States Attorney for the Southern District of New York intends to seek additional charges against the accused for conspiracy to sell, receive and distribute narcotics in violation of Title 21 U.S.C., Section 173 and 174, as the result of activities involving heroin beginning approximately March 1970.

The 1868 Extradition Convention between the United States and Italy, as supplemented, does not contain a general prohibition against the detention, trial or punishment of persons extradited for other than those crimes for which extradition was granted. However, Article III provides that persons delivered up for enumerated crimes shall in no case be tried for any ordinary crime committed previously to that for which their surrender is asked. The offenses covered by the indictment returned in the United States District Court, Southern District of New York, concern offenses committed by Messrs. Kella and Laurent on or about May 27, 1970, well after those committed on or about September 15, 1968 until April 22, 1969 for which their extradition was sought from Italy and granted. However, it is noted that a general prohibition, as stated above, is contained in Article XV of the recently negotiated Treaty on Extradition between the United States and Italy which is to be signed in the near future.

In view of the language of the new treaty, the Embassy has been instructed formally to ascertain whether the Government of Italy has any legal objection to the trial of Messrs. Kella and Laurent on the further charges summarized above which, like those for which they were extradited, involve unlawful traffic in a substantial quantity of heroin and thus a serious offense under United States law.

Enclosures:
As stated

APPENDIX D

Note Verbale No. 099/2/35176
(72/7434-1)

No. 72/7434-1

UNITED STATES OF AMERICA

DEPARTMENT OF STATE

TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETING:

I CERTIFY THAT the document hereunto annexed is a true copy from the files of the Department of State of a note no. 099/2/35176 from the Italian Government to the Embassy of the United States in Rome, relating to the extradition of Laurent Fiocconi and Jean Claude Kella, together with a copy of English translation of said note.

IN TESTIMONY WHEREOF, I, John N. Irwin II, Acting Secretary of State, have hereunto caused the seal of the Department of State to be affixed and my name subscribed by the Acting Authentication Officer of the said Department, at the city of Washington, in the District of Columbis, this fourteenth day of July, 19 72.

John N. Irwin II
Acting Secretary of State

(SEAL)

BY Francis J. Fillius
Acting Authentication Officer, Department of State.

DEPARTMENT OF STATE 727434-1

DIVISION OF LANGUAGE SERVICES
(Translation)

LS NO. 30281
T-53/R-XVIII
Italian

Ministry of Foreign Affairs

099/2/35176 Rome,

NOTE VERBALE

The Ministry of Foreign Affairs, in reference to Note Verbale No. 386 of June 14, 1972, and previous correspondence, has the honor to inform the Embassy of the United States of America that the competent Italian authorities have communicated the following:

"As is known, Laurent Fiocconi and Jean Claude Kella were surrendered to the Government of the United States for extradition in execution of the ministerial decree of September 28, 1971.

"Subsequently a request was made for an extension of the extradition of the aforesaid, which had already been granted, because they were also charged with the crime of trafficking in drugs in a warrant for their arrest, issued September 11, 1971, by the United States District Attorney for the Southern District of New York.

TO THE EMBASSY OF THE UNITED STATES

OF AMERICA

Rome

On February 24, 1972, the Attorney General of Florence requested the Examining Division of the Court of Appeals of the same city to render a judgment in the matter of extradition respecting the crime figuring in the above-mentioned arrest warrant, a judgment which has not yet been given since some supporting documents requested by the aforenamed Examining Division did not reach the Ministry of Justice until June 17, 1972.

"In the meanwhile, however, the same Ministry received the enclosed documented statement to the effect that the judicial authority of the United States is alleged to be taking criminal proceedings against Messrs. Fiocconi and Kella for the crime discussed in the second extradition request, that is, even before the Italian authority has declared its opinion on the subject."

The Ministry of Foreign Affairs, therefore, has the honor to request the Embassy of the United States of America to provide, at the earliest possible moment, the appropriate explanations on the subject, which concerns its own Government, as is made clear in the aforesaid statement. In the expectation of information on this matter, the Ministry of Foreign Affairs takes advantage of the opportunity to renew to the Embassy of the United States of America the assurance of its highest consideration.

* * * *

* * * *

I hereby certify that the above translation bearing LS No. 30281 was prepared by the Division of Language Services of the Department of State and that it is a correct translation to the best of my knowledge and belief.

Dated:
Jul 12 1972

Marcello F. Woerheide
Acting Chief, Translating Branch

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-332

CHARLES LAURENT FIOCCONI
and JEAN CLAUDE KELLA, PETITIONERS

v.

ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. In November 1969, petitioners, citizens of France, were indicted in the United States District Court for the District of Massachusetts for having conspired from September 1968 to April 1969 to import heroin into the United States in violation of 21 U.S.C. (1964 ed.) 174. Bench warrants were issued but could not be executed. Interpol found petitioners in Italy and Italian authorities arrested them there in August 1970. A month later the United States Embassy in Rome requested petitioners' extradition. Although the Extradition Convention between the two governments (15 Stat. 629, as amended) does not include narcotics

offenses, the Embassy sought extradition as an exercise of comity since the Convention does not preclude extradition for narcotics offenses and since petitioners' acts, as alleged in the indictment, would be crimes under Italian law. After appropriate proceedings, a court in Florence directed petitioners' extradition for the purpose of standing trial on the Massachusetts charges. (Pet. App. 5a-6a.)

After being removed to Boston on October 6, 1971, petitioners pleaded not guilty. Bail was fixed at $250,000 each, which was met by a surety bond secured by a certified check for $500,000 drawn on a Swiss bank. Shortly after their release on bail, petitioners were subpoenaed to appear before a federal grand jury in the Southern District of New York. When they appeared they were arrested on warrants issued under an indictment returned the same day, which charged them with a substantive crime involving the sale and concealment of heroin on May 27, 1970. Bail was fixed at $100,000 each, which petitioners were unable to post. Subsequently, the grand jury returned a superseding indictment charging petitioners and twenty-one others with having conspired to violate the narcotics laws from January 1970 to January 1972 (the date of the indictment), and with two substantive offenses in May 1970. Bail was again set at $100,000, which petitioners were unable to meet. (Pet. App. 6a-7a.)

Petitioners then sought a writ of habeas corpus from the United States District Court for the Southern District of New York, contending that their detention there on a charge other than the one for which they had been extradited was an act of bad faith under inter-

national law, rendering the district court in New York without jurisdiction over them and requiring their release under *United States* v. *Rauscher*, 119 U.S. 407, and 18 U.S.C. 3192. The district court denied the petition on March 16, 1972. Petitioners appealed and moved for a stay of their trial, which was scheduled for May 16. The court of appeals ruled from the bench after argument on May 12 that the writ should not issue; accordingly it denied a stay and indicated that an opinion would follow (Pet. App. 2a-3a). Following a jury trial, petitioners were convicted on May 24. On June 19, 1972, they were sentenced to imprisonment for twenty-five years; an appeal from that conviction is presently pending in the Second Circuit.

In its opinion of June 12, 1972 (Pet. App. 4a-15a), affirming the denial of habeas corpus relief, the court of appeals held that, since comity was the basis for the extradition, the question whether the writ should issue under the principles of *Rauscher*, *supra*, depended on "whether the surrendering state would regard the prosecution at issue as a breach" (Pet. App. 12a). The court noted that the United States had requested Italy to broaden the extradition order to include the New York charges, but that no response had yet been received (Pet. App. 7a). Since the New York charges, although relating to a period subsequent to that covered by the Massachusetts indictment, were of the "same character as the crime for which [petitioners] were extradited," the court held that, absent an affirmative protest from Italy, comity had not been breached (see Pet. App. 13a-15a). The court indicated that its ruling would not preclude petitioners from raising the

point on the direct appeal of their convictions but that its holding would constitute the law of the case in the absence of new developments (Pet. App. 15a).

2. There have been a number of developments since the decision of the court of appeals. On July 12, 1972, the United States Embassy at Rome transmitted an inquiry from the Italian Ministry of Foreign Affairs requesting an explanation of petitioners' indictment and trial in the Southern District of New York.[1] The United States responded on August 17, 1972, in its Note Verbale No. 552 to the Italian officials; we are printing a copy of this response as Appendix A to this Memorandum, *infra*.

On October 4, 1972, the United States Embassy in Rome was informed that the Court of Appeals in Florence had acted with respect to the Note Verbale No. 736 of the United States, dated December 22, 1971 (Pet. App. 16a-18a), which had initially informed the Italian authorities of the Federal indictments in New York. The decision of the Florence court, a translated copy of which we are including as Appendix B, *infra*,[2] approved extension of extradition to include the offenses in the New York indictments. This decision is now pending before the Italian Ministry of Grace and Justice, which under Italian law must officially approve extradition decisions of the Italian courts. The Department of State has requested that the decision be

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[1] This is reprinted in Pet. App., at pp. 21a-23a.

[2] We are filing authenticated copies of this opinion with the Clerk of this Court.

expedited, but we are unable to determine when the Italian government will make its formal decision.[3]

If Italy officially extends extradition, the issue raised in the petition for a writ of certiorari—whether the indictment and trial of petitioners for offenses not mentioned in the extradition request is an act of bad faith by the United States depriving the trial court of jurisdiction—will no longer be present in the case. Nevertheless, we submit that certiorari should be denied without awaiting further developments. The petition here arises out of petitioners' application for a writ of habeas corpus prior to trial and conviction under the New York federal indictment. In denying habeas corpus, the court below stated that petitioners will not be precluded from raising the issue presented here "on an appeal from their convictions," although "this opinion will constitute the law of the case as far as this court is concerned * * * in the absence of any new developments, of fact or of law, that would call for a different conclusion" (Pet. App. 15a). Petitioners were thus permitted to preserve the claim on appeal from the criminal convictions. Petitioners have appealed their convictions and have raised the comity issue; oral argument before the Second Circuit is set for November 28, 1972. Therefore, the issue presented in this case has been sufficiently preserved in what is now the pertinent legal proceeding. Should the convictions be affirmed, petitioners will have the opportunity to reassert their comity argument in seeking review of any

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[3] We are informed that petitioners have appealed the decision of the Florence Court of Appeals to the Court of Cassation.

such decision. But by that time, it is likely that the Italian government will have acted formally on the extradition request, and the Court will then be in a position to determine whether the breach-of-comity claim is even viable.

We also add that, with respect to the Massachusetts indictment, petitioners have changed their pleas from not guilty to guilty and on October 24, 1972, were sentenced to nineteen years' imprisonment, to run concurrently with their New York sentences. Since petitioners are therefore lawfully under sentence of imprisonment regardless of the outcome of their present habeas corpus proceeding, there would be no prejudice to them in deferring consideration of the comity issue raised here until review is sought from the decision of the court of appeals on their pending criminal appeal.

For the foregoing reasons, the petition for a writ of certiorari should be denied.[4]

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1972.

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[4] In the meantime, as long as this case remains on the docket, we shall of course keep the Court apprised of any further developments in this matter.

APPENDIX A

Republic of Italy
Province of Rome
City of Rome
Embassy of the United States of America } SS:

I, Walter H. Hummel, Consul of the United States of America at Rome, Italy, duly commissioned and qualified, do hereby certify that the annexed copy of Note Verbale No. 552 dated August 17, 1972, transmitted by the Embassy of the United States of America to the Italian Ministry of Foreign Affairs, Rome, is a true and faithful copy of the original this day exhibited to me, the same having been carefully examined by me and compared with the said original and found to agree therewith word for word and figure for figure.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of the Consular Service of the United States of America at Rome, Italy, this 17th day of August, 1972.

/s/ Walter H. Hummel
WALTER H. HUMMEL
Consul of the United States of America

[Seal]

No. 552

The Embassy of the United States of America presents its compliments to the Ministry of Foreign Affairs and has the honor to refer to Note Verbale No. 099/2/35176 from the Ministry with a request for information concerning the criminal proceedings that have taken place against Jean Claude Kella and Charles Laurent Fiocconi in the United States District Court, Southern District of New York, since their extradition from Italy on or about October 6, 1971.

It is noted that the Ministry's Note Verbale characterizes the request made by the Embassy in its note No. 736 dated December 22, 1971 as a request for 'an extension of the subjects extradition' and that the note also refers to the Embassy's request as concerning 'a second extradition request'.

The Embassy's note No. 736 spoke of the intention of the United States Attorney for the Southern District of New York to seek charges against Messrs. Kella and Fiocconi additional to those for which their extradition for trial in the District of Massachusetts had been granted. The operative and last paragraph of the Embassy's note made reference to the language contained in Article XV of the new extradition treaty between the United States and Italy, which has yet to be signed and to come into force, in seeking to be informed whether the Government of Italy had any legal objection to the trial of Messrs. Kella and Fiocconi on the new and serious charges, similar to those in the District of Massachusetts, pending against them in the United States District Court, Southern District of New

York. The note was neither cast as a request for approval of extradition for this purpose nor was it intended to have that effect so far as the United States Government is concerned.

Messrs. Kella and Fiocconi were not extradited from Italy pursuant to the outstanding United States/Italian Extradition Treaty concluded on March 26, 1868, which does not list narcotic offenses, but rather pursuant to Italian municipal extradition law in view of the seriousness under the laws of both the United States and Italy of the narcotic offenses with which they were charged in the District of Massachusetts. When seeking extradition by reason of the law of the requested State rather than under an extradition treaty, the United States seeks generally to comply with the procedural provisions of its outstanding bilateral extradition treaty with the requested State if there is such a treaty. Even if that practice were extended in this case to apply the rule of speciality as set out in Article III of the 1868 Treaty, the language of both the Italian and the English texts provides that the person or persons extradited for enumerated offenses shall in no case be tried for any ordinary crime 'committed previously to that for which his or their surrender is effected'. It is noted that Article III by its own language is inapplicable when the person or persons have not been delivered up for crimes enumerated in Article II of the 1868 Treaty. However, even if the language of Article III were applied in the subject case despite its legal inapplicability, it would not bar the United States authorities from prosecuting Messrs. Kella and Fiocconi for offenses committed after those for which their extradi-

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tion was granted. As indicated in the Embassy's note No. 736, the offenses alleged to have been committed by the subjects in the Southern District of New York were committed on or about May 27, 1970, after those committed in the District of Massachusetts on or about September 15, 1968 until April 22, 1969 for which their extradition from Italy was effected.

The Embassy's note No. 736 was sent not because the Department of State believed that the approval of the Italian authorities was required for the prosecution of Messrs. Kella and Fiocconi on the new narcotic charges to be in compliance with the conditions of their extradition, but primarily to inform the Government of Italy of new developments as a courtesy in view of the language of the rule of speciality as set out in Article XV of the new treaty draft. Any legal objections raised by the Italian authorities were to be taken into consideration in light of all the relevant circumstances.

The Office of the United States Attorney for the Southern District of New York proceeded to seek and obtain an indictment against Kella and Fiocconi charging them with receiving, concealing, selling and facilitating the transportation, concealment and sale of approximately 37 kilograms of heroin in violation of Title 21, United States Code, Sections 173-174. Bail, initially set at $250,000 for each defendant, was subsequently reduced to $100,000 each; they were remanded to custody on failure to post bail. It was the original intention of the Office of the United States Attorney to delay actual trial until after receipt of a response by the Embassy to its note No. 736. However the rules applicable in the First Circuit [sic], which includes the

Southern District of New York, in implementation of the Constitutional requirement for a speedy trial, require that a person indicted be brought to trial within six months of his indictment. Failure to do so results in dismissal of the indictment. Upon dismissal of the indictment against Messrs. Kella and Fiocconi the bail set for them would have been exonerated and they would have been released.

It was the considered opinion of all those involved in this matter that the release of Messrs. Kella and Fiocconi on bail, regardless of the precautions that could and would have been taken, would have permitted them by reason of their wide connections and ample resources to flee from the United States and thus avoid prosecution not only on those charges pending in the Southern District of New York but also on the charges pending against them in the District of Massachusetts. It will be recalled that Messrs. Kella and Fiocconi were each able to meet $250,000 bail by surety bonds secured by a $500,000 certified check drawn on a Swiss bank, in order to obtain their release from custody on the charges pending against them in the District of Massachusetts. The trial in that District has been delayed by the defense tactics of both defendants. Moreover, at the time of the arrest of the subjects in Italy for extradition, both were found to have assumed identities, false documentation and large amounts of foreign currency. It was believed by the Department of State and the Department of Justice that the absence after five months of a response to the Embassy's courtesy request in the form of its note No. 736 should not by further delay be permitted to result in the dismissal of the

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indictment against Kella and Fiocconi and their consequent release, which in turn would in all likelihood have resulted in their escape from prosecution for the serious offenses of which they are suspected in both jurisdictions. It was considered that the Government of Italy would not wish the pending courtesy inquiry to bring about such a result.

The trial of the subjects in the Southern District of New York commenced on May 16, and resulted in their conviction on three counts on May 24, 1972. On June 19, 1972 they were each sentenced to 25 years imprisonment, and are presently appealing from the conviction, claiming, inter alia, that the United States, District Court in the Southern District of New York was without jurisdiction to try them as their extradition from Italy was only to stand trial for narcotics charges pending in the District of Massachusetts.

It is hoped that the above explanation of the rationale for the Embassy's note No. 736 and the action subsequently taken in the United States District Court for the Southern District of New York will prove satisfactory to the Government of Italy.

The Embassy avails itself of this opportunity to renew to the Ministry of Foreign Affairs the assurance of its highest consideration.

Embassy of the United States of America,

Rome, August 17, 1972.

Appendix B

Department of State
Division of Language Services
(Translation)

Italian Republic

In The Name Of The Italian People—The Preliminary Investigation Section Of The Court Of Appeal Of Florence, meeting in chambers, composed of:

Dr. Giuseppe Leone	Presiding Judge
Dr. Giovanni Remaschi	Judge
Dr. Luigi Leoncini	Judge

has pronounced the following

Judgment

in criminal proceedings against:

(1) Jean Claude Kella, born at Toulon, France, August 13, 1945;

(2) Laurent Fiocconi, born at Perpignan, France, March 31, 1941; for extension of extradition to the United States

notes

that, by a bill of indictment of February 22, 1972, the Public Prosecutor of this Court requested that proceedings be instituted to extend the extradition of the above-named, in accordance with the request of February 10, 1972, of the Ministry of Grace and Justice, which transmitted Note Verbale No. 736 of December 22, 1971 from the Embassy of the United States at

Rome, whereby the Government of Washington sought extradition for the crime of trafficking in narcotics committed in New York on May 27, 1970. Through a complete bill of indictment of May 8, 1972, the same Public Prosecutor pointed out that the aforesaid Note No. 736 from the Embassy of the United States, besides presenting a claim for extradition relating to the crime of trafficking in narcotics and specifically 37 kgs. of heroin, a crime committed May 27, 1970, in New York, as appears in formal indictment No. 70 of the District Court of the United States for the Southern District of New York, also concerned the charge of conspiracy, committed for the purpose of selling, receiving and distributing narcotics in violation of Article 21 and Articles 173 and 174 of the Code of the United States (activities having to do with heroin carried out at the start in March 1970), as indicated in indictment No. 71 of the District Court of the United States for the Southern District of New York and in the warrant of arrest, issued in this connection November 11, 1971. The Public Prosecutor therefore requested that the extradition proceedings, in addition to the substance of his request of February 22, 1972, be extended also to the charge of conspiracy mentioned above.

After the preliminary formalities had been completed, by a bill of indictment of June 22, 1972, summarizing the previous facts, the Public Prosecutor asked that extradition proceedings be instituted for the two aforementioned offenses. From a judicial standpoint, although the registered letters sent by the Public Prosecutor to the two accused men, inviting them to elect domicile, were returned unopened, the Prelim-

inary Investigation Section considers nonetheless that the hearing has been duly opened since the two accused, on May 10, 1972, appeared before the District Court of the United States for the Southern District of New York, were informed of the new procedure, which had been instituted before this Judicial Authority for the aforementioned purposes, and appointed their counsel, at whose addresses they elected domicile. Hence it is a matter of an act that is far more solemn and a more secure guarantee than a mere reply by letter, and it is sufficient to satisfy the procedural requirements of Article 177 bis of the Code of Criminal Procedure.

It should be pointed out that this Preliminary Investigation Section, by a decision made as early as February 8, 1971, handing down a judgment on a request from the same foreign authority, decided in favor of the extradition to the United States of America of French citizens Jean Claude Kella and Laurent Fioconi, who had been arrested in Ansedonia di Orbetello, being sought by Interpol under a warrant of arrest issued November 20, 1969, by Federal Judge Ford of the Federal District Court of Massachusetts, on the charge of trafficking in drugs (acts committed from September 15, 1968, to April 22, 1969).

In this particular case, therefore, it is a question of the assumption of "extension" of the aforesaid extradition (effected October 6, 1971), an assumption which, though not expressly provided for by the Code, is unanimously acknowledged by jurisprudence, so that the functional and territorial jurisdiction of this Preliminary Investigation Section, which normally is

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based on the place of arrest of the persons to be extradited, is now again linked with the earlier proceedings.

It might be remarked that, according to a literal reading of Article 3 of the Convention between Italy and the United States, implemented by Royal Decree of February 14, 1969 [sic. -1869], this extension procedure would be unnecessary because it is prohibited to prosecute "for any ordinary crime, committed *previously to* that for which his or their surrender is asked," while the events cited above are subsequent to those for which extradition was requested and granted.

Since, however, not only our code of criminal procedure but all the conventions arrived at subsequently among the various States, including the European Treaty of Extradition, enforced in Italy by Law No. 800, of January 30, 1963, prohibit prosecution for acts committed "before the surrender," and a provision of this sort is also contained in Article 15 of the new extradition treaty between the United States and our country, now being signed, the provisions contained in the old convention would be in conflict with the general principle of international law.

In this matter all the conditions for granting the request obtain. Even if the specific offenses for which extradition is requested are not included in Article 2 of the Convention, nevertheless sufficient indications of guilt remain to warrant permitting the commencement or continuation of criminal proceedings. Indeed, a specific and detailed charge of complicity has been brought against them as a result of a deposition made before a district court, and this session is not concerned with the importance which, according to foreign legis-

lation, seems to be attached to the full confession of a suspect, who also provides information implicating others, even to the extent of granting him immunity, since it is inappropriate here to give legal recognition to an institution which might prove to be contrary to the standards of law and order under our system, but rather to consider the degree of trustworthiness to be imputed to the "accuser" independently of his position as codefendant. Now, whereas on the one hand it is noteworthy that the reliability of the charges was recognized as sufficient to initiate proceedings, with the consequent issue of an arrest warrant, on the other hand it can not be believed that the charges were inspired solely by the aim of gaining immunity for himself since the accuser certainly could not escape the criminal consequences of a false accusation.

Furthermore, the above-mentioned charges, which in themselves already constitute grounds, even under our system, for instituting criminal proceedings (cf. Article 1 of the Italo-American Convention of March 23, 1868), are additional to other evidence, equally serious, consisting of the fact that Fiocconi and Kella were both in Italy, where they intended to live clandestinely, under false names, provided with false documents, and were found in possession of a considerable quantity of foreign currency, thus substantiating the indictment, which stated that a large part of the money obtained from the drug traffic was delivered to Fiocconi and Kella.

THEREFORE

THE PRELIMINARY INVESTIGATION SECTION of the Court

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of Appeal of Florence; In consideration of Article 667 of the Code of Criminal Procedure,

decides

in favor of the extension of the extradition awarded by judgment of February 8, 1971, and executed October 6, 1971, with respect to French citizens Jean Claude Kella and Laurent Fiocconi, an extension which now includes the offense of dealing in 37 kgs. of heroin, an offense committed May 27, 1970, in New York, and the offense of conspiracy committed in order to sell, receive and distribute narcotics, activities begun in March 1970, according to formal indictments Nos. 70 and 71 of the District Court of the Southern District of New York, and in accordance with the requests of December 22, 1971, and April 19, 1972, of the Washington Government through the Embassy of the United States at Rome.

☆ U.S. Government Printing Office: 1972—488-700/304

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2 1972
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-332

CHARLES LAURENT FIOCCONI and JEAN CLAUDE KELLA,

Petitioners,

-v.-

ATTORNEY GENERAL OF THE UNITED STATES, UNITED STATES ATTORNEY, and UNITED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF NEW YORK, and WARDEN, FEDERAL DETENTION HEADQUARTERS, West Street, N.Y.,

Respondents.

SUPPLEMENTAL BRIEF FOR PETITIONERS PURSUANT TO RULE 24(5)

RAYMOND BERNHARD GRUNEWALD
Attorney for Petitioners
16 Court Street
Brooklyn, New York 11241

GRUNEWALD, TURK & GILLEN
Of Counsel

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No.

CHARLES LAURENT FIOCCONI and JEAN CLAUDE KELLA,

Petitioners,

-v.-

ATTORNEY GENERAL OF THE UNITED STATES, UNITED STATES ATTORNEY, and UNITED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF NEW YORK, and WARDEN, FEDERAL DETENTION HEADQUARTERS, West Street, N.Y.,

Respondents.

SUPPLEMENTAL BRIEF FOR PETITIONERS
PURSUANT TO RULE 24(5)

In response to the government's assertion that the Writ should not now issue, in essence, because:

> (1) the issue <u>may</u> become moot <u>if</u> the Italian Ministry of Grace and Justice officially approves the decision of the Court of Appeals of Florence (a decision presently under appeal and which was decided <u>subsequent</u> to what is patently an illegal trial),

(2) the petitioners' rights to the same relief have been "preserved" in their present appeal from an illegal trial (and therefore unlawful conviction) in the Southern District of New York, and

(3) there is no prejudice since the petitioners are presently under a lengthy sentence of imprisonment pursuant to a plea of guilty to the charge for which they were actually extradited,

it should be noted that the reply skirts the real questions: If the trial court in New York had no jurisdiction to try the petitioners, but illegally assumed jurisdiction and thereby acted in violation of law, can the trial court's original lack of jurisdiction be remedied by the government of this country subsequently seeking, and even obtaining, ex post facto "ratification" by a foreign nation of this country's unlawful use of authority? Is it any answer to an original lack of jurisdiction to state that a decision can be deferred because petitioners are exercising their appellate rights as to all issues, including this issue, thereby placing on the petitioners the burden and expense of another appeal when this Court can render a determination of an issue that would be dispositive of the need for further appeals? Can it be fairly stated that there is no prejudice when, as a result of the government's tactics of trying petitioners first in New York, the petitioners were denied the cogent defense of double jeopardy as to the New York charges had they been tried first as to the conspiracy alleged in the Massachusetts indictment and for which they had been extradited? Is there no prejudice where petitioners are under sentence to 25 years imprisonment in New York when they stand sentenced to 19 years imprisonment in Massachusetts under a concurrent sentence?

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In United States ex rel Donnelly v. Mulligan, et al., 74 F.2d 220 (2d Cir. 1934), (cited at p. 11, of the petition) the petitioner there, having been tried and convicted in the district court for the Southern District of New York, was not kept incarcerated, under the charge for which he sought the Writ, until the government of the United States secured official sanction for what the Circuit Court, in essence, presumed to be an act of bad faith at the time of the unlawful conviction.

Inherent in the rationale granting a writ under the circumstances of the instant case is the doctrine that the government should not be able to profit from its own illegal acts. In this instance a dangerous precedent can be created. For what matters rights under extradition law if the right can be flouted until such pressure is brought to bear that an unlawful act can be, posthumously, given sanction and color of right.

CONCLUSION

For these reasons and for the reasons already presented in our Petition for Certiorari, petitioners' rights under the Constitution and Laws of the United States, and the Law of Nations, were violated and their petition for a Writ of Certiorari should be granted so that this Court can consider the important questions of the rights of extradited persons and due process of law.

Respectfully submitted,

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